SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM—~~1965~~ 1966

No. [redacted] 71

In the Matter of

LANDON ZUCKERMAN AND SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Proceedings Below	2
Questions Presented	4
Constitutional Provisions Involved	6
Statutes and Rules Involved	6
Statement	7
Reasons for Allowance of Writ	14

Index to Appendix

Order of Disbarment of Petitioner, Landon Zuckerman and Suspension of Petitioner, Sam Haber, dated March 3, 1965	1a
Opinion on Order of Disbarment and Suspension	6a
Notice of Appeal of Petitioner Landon Zuckerman to Court of Appeals	9a
Order on Motion by petitioner Landon Zuckerman for Reargument or For Leave to Appeal to Court of Appeals, dated April 15, 1965	10a
Order on Motion by petitioner Sam Haber for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay	11a
Notice of Appeal by petitioner Landon Zuckerman to Court of Appeals, dated April 28, 1965	12a

PAGE

Notice of Appeal to Court of Appeals by petitioner Sam Haber dated March 29, 1965 ..... 13a

Order of Court of Appeals Dismissing Appeal of Petitioner Sam Haber 14a

Order of Court of Appeals Dismissing Appeal of Petitioner Landon Zuckerman 15a

Cases Cited

Aiken v. *Martin*, 11 Paige 499 (N. Y. 1845) 18

Matter of Anonymous Nos. 6 and 7 v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157 (1959) 13n., 15

In re Atlas Lathing Corp., 176 Misc. 959, 29 N. Y. S. 2d 458 18

Cohen v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954 (1961) 19

Ferguson v. *Georgia*, 365 U. S. 570, 81 S. Ct. 756 18

Finch & Co. v. *McKittrick*, 23 F. Supp. 244, aff'd 305 U. S. 395, 59 S. Ct. 256 18

Gallman v. *State*, 29 Ala. App. 264, 195 So. 768 17

Hayes v. *Missouri*, 120 U. S. 68, 7 S. Ct. 723 18

Matter of Mathot, 222 N. Y. 8, 117 N.E. 948 18

In re Murchison, 349 U. S. 133, 75 S. Ct. 623 (1955) 14

N.A.A.C.P. v. *Button*, 371 U. S. 415, 83 Sup. Ct. 328 (1963) ..... 15n.

Offutt v. *United States*, 348 U. S. 11, 75 S. Ct. 11 (1954) 15

Perlman v. *Firestone Rubber Co.*, 244 F. 304, aff'd 247 U. S. 7, 38 S. Ct. 417 (1918) 18

PAGE

In re Randall, 87 App. Div. 245, 84 N. Y. S. 294 18

In re Remy Sportswear, 16 Misc. 2d 407, 183 N. Y. S. 2d 125 18

Reynolds v. *Cochran*, 365 U. S. 525, 81 S. Ct. 723 18

Matter of Schlesinger, 404 Pa. 584, 172 A. 2d 835 14

State v. *Papa*, 32 R. I. 453, 80 Atl. 12 17

Thomas v. *Dunn*, 6 Manning & Granger 274 18

Tumy v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927) 15

United States v. *B. Goedde*, 40 F. Supp. 523 18

Wilson v. *State*, 93 Ga. App. 229, 91 S. E. 2d 201 17

Wong Young Sung v. *McGrath*, 339 U. S. 33, 70 S. Ct. 445 (1950) 15

Rules Cited

Rule 7, Special Rules of Appellate Division, Second Department 7

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The petitioners above named respectfully pray that a Writ of Certiorari issue in the above captioned case, directed to the Supreme Court of the State of New York, Appellate Division, Second Department, to review its order dated March 3, 1965, and entered in the office of the Clerk of that court on March 11, 1965 (A. 1a).

Opinions Below

The only opinion (A. 6a)[1] below was that which accompanied the order of the Appellate Division of the Supreme Court of the State of New York, Second Department (A. 1a) reported in 23 A. D. 2d 825 (1965), 259 N.Y.S. 2d 963 (1965).

There were no opinions by the Court of Appeals.

Jurisdiction

The order of the Court of Appeals, which finally determined this proceeding in New York, was dated and entered October 21, 1965. The time within which this petition for a writ of certiorari may be filed will expire on February 18, 1966, pursuant to the order of Mr. Justice Harlan dated January 11, 1966. The jurisdiction of this honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below

Petitioner, Landon Zuckerman, was the respondent in a disciplinary proceeding brought against him by Samuel Greason, Chief Counsel for the Judicial Inquiry on Professional Conduct for the County of Nassau, State of New York. In another proceeding brought against Mr. Zuckerman's law partner, petitioner Sam Haber, the identical charges as were made against Mr. Zuckerman were made against Mr. Haber. Both proceedings were tried together by agreement of the parties (see pages 11-14 of the transcript of testimony), but with the clear understanding that the evidence as against each of petitioners would only be applied as against the petitioner who might be involved in such testimony, as the case

1. Parenthetic references are to the Appendix hereto unless otherwise noted.

might be (see pages 5, 11, 34-36, 264, of the transcript of testimony).

The petitions charging professional misconduct to the petitioners here were dated July 14, 1961. Pursuant to the practice followed by the Appellate Division, Second Department of the State of New York, a referee was designated to hear and report to that Court on both petitions with his opinion thereon.

On June 6, 1964, the Referee reported to the Appellate Division that so far as petitioner Zuckerman was concerned, Charges 5A, 5B, 5F and 5H had been sustained. With regard to petitioner Haber, only Charges 5B, 5F and 5H were sustained. The charges involved are detailed at pages 7 and 8, *infra*. The Referee recommended that petitioner Zuckerman be disbarred and that petitioner Haber be suspended for two years. The Appellate Division in a single order (A. 1a) confirmed the Referee's report to the extent that the petitioner Zuckerman was disbarred, but petitioner Haber was suspended for five years rather than two; 23 A. D. 2d 825, 259 N.Y.S. 2d 963.

Petitioners then timely moved for reargument or leave to appeal to the Court of Appeals. These motions were denied in their entirety, without opinion[2] by separate orders, both dated April 15, 1965 (A. 10a, 11a).

Petitioners then timely served and filed Notices of Appeal as of right (A. 12a, 13a).[3]

2. Not reported.

3. In his Notice of Appeal, petitioner Zuckerman specifically raised Article I, section 10 and the Fourteenth Amendment of the United States Constitution, and Article 1, section 6, of the Constitution of the State of New York. In addition and on those items of complained of error not involved in the constitutional issues, petitioners timely moved in the Court of Appeals of New York for leave to appeal. The Court of Appeals denied those motions without opinion, 16 N. Y. 2d 482, N. E. 2d

Petitioners thereafter moved for leave to prosecute their pending appeals as of right on the original record in the Appellate Division, Second Department, and in opposition thereto respondent cross-moved to dismiss petitioners' appeals as of right, on the ground that no substantial constitutional question was directly involved on petitioners' appeals. The Court of Appeals, on October 21, 1965, denied petitioners' motions and granted respondent's cross-motions to dismiss without opinion.[4]

The ground stated by the separate orders of the Court of Appeals for granting the cross-motions to dismiss the appeal as of right, was that no substantial constitutional question was presented on either appeal (A. 14a, 15a).

All available remedies in the State of New York have now been exhausted and proceedings in the State courts are concluded and final.

Questions

1. Can the same court investigate, determine to prosecute, prefer the charges against, prosecute and determine the guilt or innocence of an attorney and then discipline such attorney without being held to have denied due process to such attorney within the contemplation of the Constitution of the United States?

2. To what extent may an attorney be denied the simplest constitutional rights available to all others? In the absence of a statutory provision therefor, and contrary to the rights of all other citizens, may an attorney be disciplined for refusing to turn over possession of his personal records to a disciplinary investi-

4. Not officially or unofficially reported as of the drawing of this petition.

gation, and is discipline for such refusal a denial of due process and of the equal protection of the laws?

3. Is the simple assertion of the most basic constitutional right unavailable to an attorney? When, in response to a demand therefor, an attorney makes a full disclosure of his files and records to a disciplinary investigation, but, as all other citizens may do, asserts his constitutional privilege in aid of his refusal to turn over physical possession of all of his records, turnover of which was demanded without any showing of the relevancy of such turnover to the proceeding, may such attorney be disciplined for failing to "cooperate" in the absence of any statutory requirement for such turnover, and is such discipline a denial of due process and the equal protection of the laws?

4. When, long prior to the adoption by two out of the four departments of the Appellate Division in New York of a special rule of conduct relating to the taking of an adversary *party* statement at a time when such adversary is represented by counsel, an independent third party licensed investigator, without authorization from the attorney, takes a statement from a witness in the course of a preliminary investigation to determine the existence of a claim, may the attorney be disciplined by an *ex post facto* application and amplification of the rule, and is such discipline a denial of due process and the equal protection of the laws?

5. May a local court adopt a special rule of conduct applicable only to attorneys practicing within its local geographic limits the effect of which is to unfairly discriminate against such attorneys as compared to other

attorneys practicing within the state and which discrimination also affects clients' rights to proper representation?

6. Where two separate disciplinary proceedings against two attorneys are consolidated for the purposes of trial and the trier of the facts fails to make a finding of wrongdoing as against either attorney (except, in the case of one of them, the refusal to turn over physical possession of records) and, with regard to the other charges, makes his findings in such manner as to make it impossible to tell what facts were found and as against which attorney, but concludes the guilt of each attorney, is the failure to make separate findings as to each attorney a denial of due process?

Constitutional Provisions Involved

United States Constitution, Article I, Section 10:

> "No State shall • • • pass any • • • ex post facto Law, • • •"

United States Constitution, Fourteenth Amendment:

> "Section 1. • • • nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New York, Article I, section 6 (as pertinent):

> "No person shall be deprived of life, liberty or property without due process of law."

Statutes and Rules Involved

Special Rules of Appellate Division, Second Department, adopted July 1, 1960, relating to conduct of attorneys:

"Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney."

Statement

Although there were numerous other charges against petitioners which both the Referee and the Appellate Division found had not been sustained, the four charges upon which affirmative findings were made, read as follows:[5]

"5A. The respondent has deliberately refused to cooperate with the Court in its efforts to expose unethical practices, and in its efforts to determine whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."[6]

"5B. The respondent Landon Zuckerman has submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon."

"5F. The respondent Landon Zuckerman has built up medical bills for submission to insurance

5. The petition against petitioner Haber was drawn in identical language except for the name of said petitioner in place of the name of petitioner Zuckerman.

6. Charge 5A was not found proven as against petitioner Haber by either the Referee or the Appellate Division (A1a):

companies by referring claimants to a succession of doctors, orthopedists, neurosurgeons, etc."

"5H. The respondent Landon Zuckerman has improperly and in violation of the Canons of Ethics used investigators to sign up retainers, to obtain adversary statements from parties represented by attorneys, and by having blank guardian ad litem forms signed by claimants."

Regarding Charge 5-A[7]

It would appear from a reading of the record insofar as the issue of non-cooperation (i. e., failure to "turn-over" and give custody of certain check stubs and cancelled vouchers to respondent) is concerned, that the then counsel for petitioner and counsel to respondent were interested in the issue for the sake of the issue rather than for any actual failure to cooperate.

(The following testimony was given by petitioner Zuckerman in the presence of petitioner, and Messrs. Hanrahan, Capilli and Byrnes, members of respondent's staff directly involved in the incident, and uncontradicted by them:)

"Q. When Mr. McCann (respondent's then counsel) advised the inquiry of this *Internal Revenue* investigation and its possible effects, will you tell us in substance if you don't recall the precise words, what was said by Mr. McCann and what was said by any member of the inquiry staff who may have been present, identifying such member, if you will. A. We had a conference. Judge Greason was present. Mr. Capilli, Mr. Hanrahan and Mr. Byrnes was present. I was there. Mr. Haber was there. Mr. McCann was there.

7. This portion of the statement refers only to petitioner Zuckerman and does not refer to petitioner Haber for as to him the Referee found and the Appellate Division sustained that Mr. Haber, "* * * did nothing, in my opinion, to impede the investigation." (Referee's report, pages 8-10)

We discussed the fact that did the Judicial Inquiry have a right to the books, right to the check stubs where Internal Revenue was conducting an independent investigation at the same time covering the same years. And they argued for some time and Mr. Hanrahan and Mr. McCann particularly had quite a discussion on the law and then *it was finally decided* between them that the Judicial Inquiry would serve a subpoena on Zuckerman & Haber and we agreed to accept the subpoena and we would *test out the law* on the question of the check stubs being available to the Judicial Inquiry when *Internal Revenue* was making an investigation.

"Q. So that we understand you correctly, these subpoenas which are here in evidence now (Exs. 4A, 4B) are not subpoenas which were issued because of any refusal on your part to comply with the production of any records of check stubs but were, rather, subpoenas which were issued for the purpose of testing some intricate legal question that Mr. McCann and Mr. Hanrahan saw with regard to this issue that had been raised concerning *Internal Revenue,* is that right? A. That is the impression I got from listening to the discussion" (transcript of testimony, 584-585) (emphasis supplied).

• • • • •

"Q. This was an academic issue, is that right, the question of whether they had the right to compel the turnover? A. That is correct, sir, they wanted all of them turned over to them" (transcript page 587).

• • • • •

(From the cross-examination of Mr. Byrnes, respondent's chief investigator:)

"Q. I am not raising issue with the fact that this may have been a policy matter. I am raising issue only as regards what the fact was. The fact was you wanted these checks and check stubs in your possession for your own examination. When I

say yours, I mean the Judicial Inquiry. A. Yes. That is basically correct, sir" (transcript page 465).

That the only issue before Mr. Justice Gulotta (who was designated to preside over the investigation by the Appellate Division) was "turnover" as distinct from "inspection" or "cooperation" appears from the following statement made by Mr. McCann, petitioner's then attorney, to Mr. Justice Gulotta:

> "The *only question* that I would like to have your Honor consider, and this is as to the entire financial records, I think it is unfair to say, turn them over. If they (the inquiry) want to go over their books with the respondents, it is perfectly satisfactory to us as respondents" (transcript page 54, emphasis supplied).

Counsel for petitioner and counsel to respondent apparently succeeded in confusing Mr. Justice Gulotta rather than resolving the intricate legal issue which they had contrived, for Mr. Justice Gulotta ruled as follows:

> "• • • I find that the *examination* of books and records, in view of the testimony that has gone before, are both relevant and material" (transcript pages 55-56, emphasis supplied).

The Inquiry ignored completely the fact that it was seeking possession of privileged communications as well as those which were not. The inquiry also ignored completely the fact that it was seeking to compel Mr. Zuckerman to relinquish possession of records which relinquishment could very seriously impair Mr. Zuckerman's rights viz-a-viz the Internal Revenue Service.

Apparently neither side had been able to make it clear that examination was not an issue. The issue was "turnover". Examination had been had and was always available.

It is obvious then that the only issue before Justice Gulotta was the "refusal to relinquish possession."

The transcript conclusively establishes that so far as "cooperation" was concerned—at least insofar as cooperation normally and reasonably may be measured by the making available of records, permitting records to be copied and answering any and all questions—the petitioner Zuckerman as well as petitioner Haber cooperated fully and unconditionally. The inquiry into the affairs of the petitioner started in December, 1959, and continued until well in 1961 (447). Between 150 and 200 cases handled by petitioner were inquired into and discussed with the respondents (440). There were eleven sessions at which either petitioner or his law partner attended to supply information to the Inquiry staff (exclusive of appearances before Mr. Justice Gulotta); and 4 telephone sessions (450-451).

Files were produced and left with respondent for examination (transcript 452-453). Copies of records supplied by petitioner were made by respondent (transcript 454-455).

The respondent examined and made notes from the check records of petitioner (transcript 455-457, 468-469, 578-580) and every question, including those which petitioner later refused to answer, was answered by petitioner before he asserted his privilege (transcript 572, 574, 575, 580-581).

Regarding Charges 5B and 5F

Here the Referee's report made no distinction between either petitioner or the members of their staff and office as to who did what. Everything was lumped together and the charges held sustained as against petitioners with nothing in the report or the opinion of the Appellate Division to show what the Referee or the Court found

that the petitioners had done (see Referee's report in record). No specific act of misconduct by petitioners was found by the Referee.

The record below shows that the petitioners testified to a complete lack of knowledge of any impropriety in the handling of bills of particulars or referrals to specialists for consultation and the respondent stipulated as follows:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the petitioner (respondent here) does not intend to raise any issue as to the testimony of the respondents (petitioners here) regarding their office procedures in connection with the preparation and verification of bills of particulars and examinations before trial."

With regard to Charge 5F, the respondent stipulated, at pages 951-952 of the transcript, that:

> "We recognize, of course, that in any negligence case the attorneys for the plaintiff, if they think it is advisable, have the right and duty to send their patients to specialists, orthopedists, neurologists and whatnot, if the facts in the particular case seem to indicate that it is proper."

Although respondent produced evidence that in only 13 out of more than 800 cases handled, petitioners' law firm had referred clients to medical specialists for evaluation, respondent didn't even attempt to prove that such referral was other than perfectly proper. As a matter of fact, the evidence that petitioners never attempted to influence the conclusions or findings of any specialist, never requested a specialist to modify his report and never sent a client to a specialist to build up medical bills, is completely uncontradicted on the record.

With regard to Charge 5B, there was absolutely no evidence that any medical bills were false, let alone known

to petitioners to be false. There was no evidence that petitioners ever knowingly submitted a false bill of particulars or lost earnings statement in the course of litigation.

In not a single aspect of these two charges does the Referee's report find any improper conduct on the part of either petitioner.

Charge 5H

Although this charge contained many specifications, the Referee considered only that aspect dealing with "adversary statements" and the charged violation of Special Rule 7 (Referee's report pp. 52-55).

In dealing with that charge and although the alleged adversary party statements were taken by petitioners' investigator without instructions from petitioners so to do, and although the statements were taken long prior to the adoption of Special Rule 7 (the rule was adopted July 1, 1960), and, without exception, all statements were taken before any claim had been asserted or any action had been started and the statements for the most part were the oral statements of *witnesses* reported by the investigator and not of parties, the Referee found that Special Rule 7 applied and that, contrary to its specific language, it applied to witnesses as well as to parties and that it applied even though the alleged violations occurred long prior to July 1, 1960.

The Proceeding Itself

The proceeding out of which the petitioner were ultimately disciplined, operated in the following manner:[7]

7. There is no change from the factual genesis of this proceeding as compared to the proceeding described in *Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157, decided June 15, 1959, wherein a preliminary inquiry was had and a report thereon rendered

1) The Appellate Division, Second Department, ordered an investigation into the conduct of attorneys in Nassau County specializing in personal injury cases and designated Mr. Justice Gulotta to conduct that investigation. Respondent was appointed by the Appellate Division as counsel to that inquiry..

2) Mr. Justice Gulotta and respondent conducted an inquiry into petitioners' conduct and following that inquiry Mr. Justice Gulotta reported the results thereof to the Appellate Division.

3) On the basis of that report the Appellate Division ordered that charges be brought against petitioner and appointed a referee to hear and report.

4) Following the hearings the Referee reported to the Appellate Division and on the basis of the Referee's report the petitioners were disciplined.

Reasons for Allowance of the Writ

1.

Where a single agency acts as investigator, drawer of charges, prosecutor and judge a fundamental violation of due process occurs.

In re Murchison (1955), 349 U. S. 133, 75 S. Ct. 623;

Matter of Schlesinger, 404 Pa. 584, 172 A. 2d 835;

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to the Appellate Division, Second Department. Thereafter, and with regard to petitioners, the Appellate Division, Second Department, ordered that a disciplinary proceeding be brought against petitioners and referred the matter to the Referee to hear and report. (See pp. 1 and 2 of the affidavit of respondent, dated September 22, 1965, and contained in the certified record of the Court of Appeals submitted on this petition.)

Wong Young Sung v. *McGrath,* 339 U. S. 33;
Tumy v. *State of Ohio,* 273 U. S. 510, 47 S. Ct. 437;
Offutt v. *United States,* 348 U. S. 11, 75 S. Ct. 11.

In the case at bar the Appellate Division, Second Department, decided to investigate, investigated by its own arm, decided to prosecute, prosecuted and concluded the petitioners' guilt and then meted out the discipline it considered appropriate to the offense. The Appellate Division did all of this in the absence of any published rules of procedure or statutory authority therefor. Although in New York the respective Appellate Divisions have supervision over the conduct of attorneys, there is no statute or rule of court which authorizes them to conduct their own investigations, draw their own conclusions, hold their own hearings and draw their own conclusions thereon. It cannot be overlooked that in the case at bar the Appellate Division, Second Department, directed that charges be brought after considering the results of its own investigation (see affidavit of Samuel Greason dated September 22, 1965 on motion in the Court of Appeals to dismiss petitioner's appeal as of right).

In the case at bar there wasn't even the intervention of an independent bar association bringing the charges and carrying the burden of prosecution. Everything that was done here was done under the direction and control of a single court.

Although the investigative procedures followed in New York were approved by this honorable Court in *Matter of Anonymous Nos. 6 and 7* v. *Baker, supra,* this Court never reached and has not as yet decided the broader question of the same court not only concluding that charges should be brought against an attorney on the

basis of its own secret inquiry, but then hearing the charges and passing on the guilt or innocence of the attorney on substantially the same evidence as induced the decision to prefer the charges in the very first instance.

It is respectfully submitted that in our constitutional scheme of things such a procedure fails to meet constitutional standards of due process.

2.

It is elemental that a rule which has no retrospective provisions cannot be violated before its adoption.

To have extended Special Rule 7 to include "witnesses", when the Rule speaks only of an "adverse party" in a "pending claim or action" is bad enough. To then give the Rule retrospective effect is to pass an "ex post facto" law. The fact that a disbarment or a five year suspension is a penalty partaking almost of a criminal conviction need not be argued. To disbar a lawyer on an ex post facto application of a rule extended beyond its own clear and unambiguous language is a denial of a fundamental constitutional right.

Of the six witnesses' "statements" referred to in the Referee's report, only one was in writing (Cox). Of the other five, four "statements" were nothing more than the investigator's reports of his interviews with those witnesses (1381-1384). Of the fifth there was no evidence that any statement ever existed or any interview actually had (1364). The latest "statement" taken (Cox) was taken on May 27, 1959, more than a year prior to the adoption of Special Rule 7.

Respondent conceded that he could not prove that petitioners ever instructed the independent investigator

involved to take the statements of so-called "adverse witnesses" (1351-1352) and the Referee found that no such instructions had ever been given by petitioners (Referee's Report, p. 53).

The Referee's unwarranted extension of Special Rule 7 to witnesses, and the adoption of that extension by the Appellate Division, was in direct violation of Canon 39 of the Canons of Professional Ethics, of the New York State Bar Association in force at the time the alleged "statements" were taken. In addition, the Referee's extension of the Rule to witnesses flies in the face of established law as to the duty and obligation of attorneys to interview all witnesses who might shed light on the issues.

> *State* v. *Papa,* 32 R. I. 453, 80 Atl. 12;
> *Wilson* v. *State,* 93 Ga. App. 229, 91 S.E. 2d 201;
> *Gallman* v. *State,* 29 Ala. App. 264, 195 So. 768.

In extending the Rule to witnesses the Referee equated "attorneys" with "insurance companies". The Referee argued that a witness who has insurance which covers the accident in which the witness was involved may not be interviewed (Referee's Report, p. 53). The effect of this is to insulate all witnesses from investigation for there are few persons who are not covered by insurance—at least in New York, where compulsory insurance for motor vehicle accidents is the rule.

Under the Referee's extension of the Rule, a plaintiff's attorney whose office is in the Second (or First) Department could not interview witnesses who are insured even in a suit brought in the Third or Fourth Departments, while his adversary in those departments would suffer no such disability. This unequal treatment of attorneys within the State of New York constitutes an unconstitu-

tional classification and would deny to a litigant in the Second Department the opportunity to have as effective representation as a litigant in the Third or Fourth Departments.

Finch & Co. v. *McKittrick,* 23 F. Supp. 244, 246-247, aff'd 305 U. S. 395; 59 S. Ct. 256;
Hayes v. *Missouri,* 120 U. S. 68, 71, 7 S. Ct. 350;
Reynolds v. *Cochran,* 365 U. S. 525, 81 S. Ct. 723;
Ferguson v. *Georgia,* 365 U. S. 570, 81 S. Ct. 756.

3.

In New York a disciplinary proceeding is a special proceeding governed by the civil rules of procedure.

Matter of Mathot, 222 N. Y. 8, 9.

A subpoena duces tecum, the device used here to cause petitioner Zuckerman to produce his records, could not be used for discovery or to compel petitioner to turn over possession of his records.

Thomas v. *Dunn,* 6 Manning & Granger, 274;
Aiken v. *Martin,* 11 Paige 499 (N. Y. 1845);
In re Randall, 87 App. Div. 245;
In re Atlas Lathing Corp., 176 Misc. 959;
Perlman v. *Firestone Rubber Co.,* 244 F. 304, affirmed 247 U. S. 7;
U. S. v. *B. Goedde,* 40 F. Supp. 523;
In re Remy Sportswear, 16 Misc. 2d 407.

The petitioner was clearly within his rights when he offered to produce all his records and answer any question, but refused to turn over possession of his papers and records. Certainly, the issue of privileged communications had to be considered in determining that which the

Inquiry should see. The Inquiry used the device of the subpoena to not only attempt to obtain possession of all of petitioner's records, but included privileged communications within its demand.

Here, then was an application of *Cohen* v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954, never even suggested by this Court. *Cohen* did not hold that a disciplinary inquiry could compel an attorney to hand over possession of any and all records on risk of disbarment for refusal to do so. Especially, *Cohen* did not hold, where an attorney had produced his records, permitted investigation thereof, and answered questions with relation thereto, that he could be disbarred for asserting his privilege against being compelled to turn over possession of those records.[8]

4.

It is too fundamental to require argument that a judgment as severe as disbarment or a five year suspension, which is tantamount to a disbarment in practical effect, based on a finding which does not set forth what it is that the individual petitioners have done violates the very fundamentals of fairness which is the basis of our concept of due process. Not only must a charge be specific, but the ultimate judgment must state the findings made with regard to the particular charge. If two persons are accused of an identical act the finding must be that one or the other or both were guilty of the act. The Referee's report (with the exception of Charge 5A) contains no

8. The thrust of *Cohen* seems largely to have been dissipated by this honorable Court by dint of its holding and reasoning in *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 83 Sup. Ct. 328 (1963). Even in *Cohen* the issue of what procedural constitutional rights are available to attorneys was left open, 366 U. S. 117, 129-130 and limited the decision to the investigative phase of a disciplinary proceeding, as distinct from its trial phase.

such finding. A reading of the Referee's report fails to disclose what petitioners or either of them did that was reprehensible with regard to Charges 5B and 5F. The conclusion of petitioners' guilt appears, but the facts as to what either or both of the petitioners did upon which the Referee and the Court based such conclusion so far as petitioners were concerned nowhere appears. All that the Referee did was to selectively detail some of the evidence and then, without attempting to connect that evidence to either or both of the petitioners, found both petitioners guilty of the charges. Although the Referee's report is lengthy, which petitioner, if either, did what and why such conduct was wrong, does not appear.

CONCLUSION

It is respectfully submitted that the constitutional issues require this honorable Court to grant the writ sought.

Respectfully submitted,

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New York, New York.

APPENDIX

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 3rd day of March, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

Proceedings having been instituted by Samuel Greason, Esq., by petitions verified the 12th day of July, 1961, in respect to Landon Zuckerman, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 14, 1949, under the name of Landon R. Zuckerman; and in respect to Sam Haber, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 15, 1953, petitioning for orders directing that said respondents Landon Zuckerman and Sam Haber, as attorneys and counselors at law, be disciplined upon the charges set forth in said petitions and why such other and further action upon the charges embodied in said petitions, as justice may require, should not be had and for such other and further relief in the premises as may be just and proper, and the respond-

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

ents having filed verified answers, and this court by orders dated and entered September 25, 1961, having referred the issues raised by the petitions and answers to George C. Wildermuth, Esq., as Referee, for hearings and reports, together with his recommendations, and the said Referee having held hearings and filed his report dated June 6, 1964 in this court on July 27, 1964, and the petitioner having moved by notice of motion, dated September 9, 1964 (1) to confirm the Referee's report with respect to the Referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only insofar as the Referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and insofar as he recommends their dismissal; and the respondents having each cross moved, by notices of cross motions dated September 14, 1964 and September 15, 1964 to affirm in part and to disaffirm in part the Referee's findings, and to dismiss the petitions.

Now on reading and filing the notice of motion of petitioner, the memorandum of petitioner, the petitions, answers, the report of George C. Wildermuth, Esq., the testimony and exhibits, notices of cross motions and memoranda of respondents, and all the papers filed herein, and Mr. Samuel Greason, petitioner, appearing in person, and Mr. Leonard Feldman appearing for respondent Landon Zuckerman, and Messrs. Caputo and Levine appearing for respondent Sam Haber, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, dated March 3, 1965, heretofore filed, and made a part hereof: it is

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered, that part of petitioner's motion to affirm the Referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H, be and the same hereby is granted; and that part of the petitioner's motion to disaffirm the Referee's findings as to charges 5-C, 5-E and 5-I, be and the same is denied; and it is further

Ordered that respondent Landon Zuckerman, admitted as Landon R. Zuckerman, is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered that the name of the said Landon Zuckerman, admitted as Landon R. Zuckerman, be struck from the roll of attorneys and counselors-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Landon Zuckerman, admitted as Landon R. Zuckerman, is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered that the respondent Sam Haber, be and he hereby is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, it is further

Ordered that the respondent Sam Haber, be and he hereby is suspended from the practice of law for a period of five years, commencing thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Sam Haber is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Ordered that the suspension of said Sam Haber hereby ordered shall continue until the further order or orders of this court permitting the said Sam Haber to resume the practice of the law which may be granted upon proof that the said Sam Haber has not practiced law as hereinabove set forth in the State of New York during the period of suspension, and has been of good moral character, proof of such good character on the part of Sam Haber, to be of the same nature and form as is required of applicants for admission to the Bar; and it is further

Ordered that the respondents' cross motions insofar as they seek a dismissal of the petition be and the same are

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

denied; and respondents' cross motions insofar as they seek to affirm in part and to disaffirm in part the Referee's findings be and the same hereby are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Enter:

JOHN J. CALLAHAN
Clerk

Opinion on Order of Disbarment and Suspension

(Filed March 3, 1965; published, N.Y.L.J. March 4, 1965)

By CHRIST, Acting P.J.; BRENNAN, HILL, RABIN and HOPKINS, JJ.

Matter of Landon Zuckerman and Sam Haber, attorneys —This is a proceeding to discipline respondents, attorneys, based on nine charges or specifications of professional misconduct (Nos. 5-A to 5-I) arising out of the recent Judicial Inquiry into Unethical Practices of Attorneys in Nassau County. The special referee to whom the issues were referred has held extensive hearings and has filed his report. The referee found that one of the charges (5-A) was sustained in so far as the respondent Zuckerman was concerned, but recommended its dismissal as to the respondent Haber. As to both respondents, the referee found that three of the other charges (5-B, 5-F and 5-H) were sustained by the proof. The referee recommended dismissal of the remaining five charges (5-C, 5-D, 5-E, 5-G and 5-I). He recommended the respondent Zuckerman's disbarment on charges 5-A, 5-B, 5-F and 5-H, and the suspension of the respondent Haber from the practice of law for a period of two years with respect to charges 5-B, 5-F and 5-H. Petitioner now moves: (1) to conform the referee's report with respect to the referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only in so far as the referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and in so far as he recommended their dismissal. Apparently, petitioner is content to rest on the referee's recommendation of dismissal of charge 5-A in so far as the respondent Haber is concerned, and on the

referee's recommendation of dismissal of charges 5-D and 5-G. The respondents have each made a cross-motion to affirm in part and to disaffirm in part the referee's findings, and to dismiss the petition. The charges which the referee sustained are: (1) that respondent Zuckerman deliberately refused to co-operate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar [5-A]; (2) that both respondents submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon [5-B]; (3) that both respondents have "built up medical bills, for submission to Insurance companies by referring claimants to a succession of doctors," etc. [5-F]; (4) that both respondents, improperly and in violation of the Canons of Ethics, used investigators to obtain signed retainers, to obtain adversaries' statements from parties represented by attorneys, and to obtain the claimants' signatures on blank forms for the appointment of guardians ad litem [5-H]. In our opinion, charge or specification 5-A is amply sustained by the proof in so far as respondent Zuckerman is concerned. We are also of the opinion that as to both respondents the three charges or specifications 5-B, 5-F and 5-H are amply sustained by the proof. We approve the referee's findings that charges 5-C, 5-D, 5-E, 5-G and 5-I have not been sustained by the proof. Charge 5-C is that respondents made gifts of United States Government bonds and cash to referrers of cases; charge 5-D

is that the respondents made payments to others than attorneys in effecting the settlement of negligence cases; charge 5-E is that respondents failed fully and properly to name referrers in statements of retainer; charge 5-G is that the respondents settled infants' claims without court orders; and charge 5-I is that the respondents stirred up litigation by having insurance brokers, doctors, automobile repairmen, police officers, bond recipients and others solicit and refer claims to the respondents' law firm of Zuckerman and Haber. Accordingly, that part of petitioner's motion to affirm the referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H is granted; and that part of the petitioner's motion to disaffirm the referee's findings as to charges 5-C, 5-E and 5-I is denied. The respondent Zuckerman is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent is disbarred and his name directed to be struck from the roll of attorneys, effective thirty days after entry of the order hereon. The respondent Haber is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, he is suspended from the practice of law for a period of five years, commencing thirty days after entry of the order hereon. The respondents' cross-motions in so far as they seek a dismissal of the petition are denied; and respondents' cross-motions in so far as they seek to affirm in part and to disaffirm in part the referee's findings are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman hereby appeals to the Court of Appeals as of right from an order of disbarment dated on the 3rd day of March 1, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, in that said order is violative of the 14th Amendment to and Article 1 section 10, of the Constitution of the United States and Article 1 section 8, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Yours, etc.,

LEONARD FELDMAN
Attorney for Respondent
Office & P. O. Address
350—5th Ave.,
New York, N. Y. 10001

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York.

Clerk of Appellate Division
Second Department

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Landon Zuckerman, having been disbarred from the practice of law, by order of this court, dated March 3, 1965 and entered March 11, 1965 such disbarment commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals, by notice of motion, dated March 29, 1965.

Now on reading and filing the affidavit of Leonard Feldman in support of said motion and the affidavit of Samuel Greason in opposition thereto and the said motion having been submitted by Mr. Leonard Feldman of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965.

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Sam Haber, having been suspended from the practice of law for a period of five years, by order of this court, dated March 3, 1965 and entered March 11, 1965, such suspension commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals and for a stay, by notice of motion, dated March 29, 1965.

Now on reading and filing the statement of Michael Caputo in support of said motion and the affidavit of Samuel Greason in opposition thereto; and the said motion having been submitted by Mr. Michael Caputo of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals and for a stay be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman, hereby appeals to the Court of Appeals as of right from an order of disbarment dated the 3rd day of March, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, 1965, in that said order is violative of the 14th Amendment to and Article 1, section 10, of the Constitution of the United States and Article 1, section 6, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Dated: New York, N. Y.
April 28, 1965

Yours, etc.,

LEONARD FELDMAN,
Attorney for Respondent,
Office & P. O. Address:
350—5th Avenue,
New York 1, N. Y.

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York.

Clerk of Appellate Division
Second Department

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE, that the respondent Sam Haber hereby appeals to the Court of Appeals from each and every part of the order made March 3, 1965, by the Appellate Division, Second Department and entered March 11, 1965, suspending respondent Sam Haber from the practice of law for five years and from the whole thereof.

Dated: March 29, 1965.

MICHAEL CAPUTO
Attorney for Sam Haber
16 Court Street
Brooklyn 1, New York

To:

SAMUEL GREASON, Esq.
Petitioner
821 Franklin Avenue
Garden City 1, New York

Order Dismissing Appeal of Petitioner Sam Haber

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 816

In the Matter of

SAM HABER, An Attorney.

SAMUEL GREASON,

Respondent,

SAM HABER,

Appellant.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

[SEAL]

A copy

GEARON KIMBALL
Deputy Clerk

Order Dismissing Appeal of Petitioner Landon Zuckerman

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

[SAME TITLE]

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court, papers having been submitted in support of and in opposition to said motion, and after having heard Leonard Feldman, Esq., argue orally in opposition thereto, and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

A copy

GEARON KIMBALL
Deputy Clerk